

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Aug 04, 2016 4:09 PM  
CLERK'S OFFICE

RECEIVED ELECTRONICALLY

byh

Supreme Court No. 92389-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

FABIAN ARREDONDO,

Petitioner.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY

---

PETITIONER'S SUPPLEMENTAL BRIEF

- Redacted -

OLIVER R. DAVIS  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**PORTIONS REDACTED  
SEE RULING DATED  
AUGUST 25, 2016**

 ORIGINAL

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER ..... 1

B. ISSUES ON REVIEW ..... 1

C. STATEMENT OF THE CASE ..... 2

D. ARGUMENT ..... 4

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED IMPROPER, IRRELEVANT, OVERLY PREJUDICIAL EVIDENCE OF AN ALLEGED PRIOR CRIMINAL ACT. .... 4

1. The defense moved to exclude all such testimony as mere suspicion, as irrelevant propensity evidence, and as more prejudicial than probative. .... 4

2. The State’s trial testimony was the same as the proffer – police officer suspicion, based on circumstantial physical evidence. ..... 5

3. ER 404(b) requires proof to the court of the prior criminal act, and prohibits evidence that is not relevant to a proper non-propensity purpose, or where prejudice outweighs probative value. ..... 6

4. Mere suspicion based on circumstantial evidence supported the defendant as being a person(s) who committed the February 2009 drive-by house shooting. ..... 7

5. Alternatively, this Court should apply a “clear and convincing evidence” standard as to whether the accused committed the prior act. ..... 9

(a). *Courts have persuasively reasoned that a clear and convincing standard is appropriate for 404(b)’s first step. See, e.g., U.S. v. Dolliole, 597 F.2d 102, 107 (7th Cir.), cert. denied, 442 U.S. 946 (1979) (purpose of clear and convincing 404(b) standard is to limit submission of prior bad acts on mere circumstantial evidence, rather than direct testimony); State v. Billstrom, 276 Minn. 174, 178–79, 149 N.W.2d 281,*

284–85 (1967) (implementing test, as an ER 404(b) “safeguard” against the inherent prejudice of prior acts, that evidence of a defendant's alleged commission of the act “must be clear and convincing.”). . . . 9

(b). *Clear and Convincing standard.* . . . . . 10

6. The stated purposes for offering the evidence were not evaluated on the record for a non-propensity purpose, or for relevance to an element, or balanced as to their probative value and prejudice. . . . 10

(a). *If the defendant is proved to have committed the prior criminal act, the court must identify the non-propensity purpose the evidence is being proffered for, and determine if it is relevant to prove an element. State v. Benn, 120 Wn. 2d at 653; State v. DeVincentis, 150 Wn.2d at 17, 23.* . . . . . 10

(b). *Intent and Motive.* . . . . . 11

(c). *Identity.* . . . . . 12

7. Even if relevant to a proper purpose, the prior criminal act was more prejudicial than probative – “almost like we’re trying two cases against Mr. Arredondo in this trial.” . . . . . 12

8. Reversal is required. . . . . . 13

II. THE COURT ERRONEOUSLY EXCLUDED THE DEFENSE EVIDENCE REGARDING SIMON’S MENTAL STATE. . . . . . 15

1. Impeachment of any witness is permitted under ER 607, and defense cross-examination to challenge the credibility and reliability of an important State’s witness is a matter of right. . . . . . 15

2. Informant Simon revealed problems with truthfulness or accuracy in his previous informant work, because of his mental state including PTSD, along with ongoing methamphetamine addiction at the time of the claimed jailhouse conversation. . . . . . 16

(a). <i>Boasting in interview; motion to cross-examine; State's argument of "stigma."</i> .....	16
(b). <i>Voir dire of witness – Simon denies these credibility issues and now boasts of superior recollection and ability to relate.</i> .....	18
(c). <i>Trial court's ruling.</i> .....	19
2. <u>The requested cross-examination was a matter of right, unless it was so prejudicial as to disrupt the basic fairness of the trial.</u> .....	20
3. <u>Reversal is required, including based on cumulative error.</u> ..	22
E. CONCLUSION .....	25

**TABLE OF AUTHORITIES**

**RULES OF EVIDENCE**

ER 401 ..... 24

ER 402 ..... 7,24

ER 403 ..... 7,13,15

ER 404(b) ..... passim

ER 607 ..... 15

ER 613 ..... 24

Fed. R. Evid. 404(b) ..... 8

**WASHINGTON CASES**

State v. Acosta, 123 Wn. App. 424, 98 P.3d 503 (2004) ..... 8,14

State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (Div. 2, 2009) ..... 8

State v. Benn, 120 Wn. 2d 631, 845 P.2d 289, 302 (1993) ..... 6,7,8,10

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984). ..... 22,25

State v. Darden, 145 Wn.2d 612, 41 P.2d 1189 (2002). ..... 15

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003). ..... 6,10

State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312 (1987) ..... 20

State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998). ..... 23

State v. Foxhoven, 161 Wn. 2d 168, 163 P.3d 786 (2007) ..... 8,12

State v. Gresham, 173 Wn. 2d 405, 269 P.3d 207 (2012) ..... 13

<u>State v. Gunderson</u> , 181 Wn.2d 916, 337 P.3d 1090 (2014) .....	13
<u>State v. Hardy</u> , 133 Wn.2d 701, 946 P.2d 1175 (1997) .....	14
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	20
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984). .....	8
<u>State v. Jones</u> , 168 Wn. 2d 713, 230 P.3d 576 (2010) .....	21
<u>State v. King</u> , 167 Wn. 2d 324, 219 P.3d 642 (2009). .....	15
<u>State v. Kilgore</u> , 147 Wn. 2d 288, 53 P.3d 974 (2002). .....	8
<u>State v. Lough</u> , 125 Wn. 2d 847, 889 P.2d 487 (1995). .....	13
<u>State v. Newton</u> , 109 Wn.2d 69, 743 P.2d 254 (1987) .....	14
<u>In re Det. of Pouncy</u> , 168 Wn. 2d 382, 229 P.3d 678 (2010). .....	9
<u>State v. Powell</u> , 126 Wn. 2d 244, 893 P.2d 615 (1995) .....	8,11
<u>State v. Russell</u> , 125 Wn. 2d 24, 882 P.2d 747 (1994). .....	16
<u>State v. Saltarelli</u> , 98 Wn. 2d 358, 655 P.2d 697 (1982). .....	11
<u>State v. Slocum</u> , 183 Wn. App. 438, 333 P.3d 541 (Div. 3, 2014) .....	7
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986) .....	8,12,13
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002) .....	12
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981) .....	7,9,10
<u>State v. Tigano</u> , 63 Wn. App. 336, 818 P.2d 1369 (1991) .....	21
<u>Washington v. Farnsworth</u> , No. 91297-1 (June 23, 2016) .....	22

State v. Young, 89 Wn.2d 613, 574 P.2d 1171, cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). . . . . 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 6 . . . . . 16

Wash. Const. art. I, § 22 . . . . . 21

UNITED STATES SUPREME COURT CASES

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) . . . 16,21

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). . . . . 22

Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) . . . . . 8

Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948) . . . . . 7

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). . . . . 16,21

UNITED STATES COURT OF APPEALS CASES

United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993) . . . . . 8,13,14

U.S. v. Dolliole, 597 F.2d 102 (7th Cir.), cert. denied, 442 U.S. 946 (1979) . . . . . 9

CASES FROM OTHER STATE JURISDICTIONS

State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) . . . . . 9

TREATISES

5A Teglund, Washington Practice, Evidence Law and Practice (5th ed. 2007). . . . . 15

## **A. IDENTITY OF PETITIONER**

Fabian Arredondo seeks reversal of his convictions for murder and assault, for allegedly being the driver of a Norteno-occupied Honda that pursued an opposing Sureno gang vehicle down a Toppenish road. Bullets were fired from the Honda at the Sureno car, killing the driver. Appendix A.

## **B. ISSUES ON REVIEW**

1. Where the jailhouse informant admitted in his interview to problems with truthfulness or accuracy in his prior informant work, and attributed these to diagnosed mental disorders, which were substantiated by medical records discovery of conditions affecting his memory, was Mr. Arredondo's 6<sup>th</sup> Amendment right to cross-examine violated when he was prevented from any inquiry into Mr. Simon's mental state at any time, both at trial, and at the time of the supposed admissions to him by the defendant, including his mental disorders and active drug addiction?

2. The Court admitted testimony suggesting that Mr. Arredondo had committed an uncharged drive-by shooting near a house in Toppenish, in February, 10 months before the charged crime. The suspicion of Mr. Arredondo's involvement was admitted under ER 404(b), but there was no proof by a preponderance that he committed the prior crime, only testimony that police located a shell casing in his Mercedes later that

month, which matched a casing found on the street outside the house as fired from the same gun. **REDACTED – SEE RULING DATED AUGUST 25, 2016**

As to motive, the undisputed evidence was that the pursuing Honda was occupied by unidentifiable Nortenos, chasing a car full of Surenos after a Norteno-Sureno fight. This chasing and shooting also showed intent by the act itself. The prior crime evidence was also inadequate to show identity by distinct similarity. The evidence simply encouraged propensity reasoning -- that the defendant, as shown by the February uncharged drive-by, had a violent propensity to drive around the community dangerously firing guns. Did the court abuse its discretion?

### **C. STATEMENT OF THE CASE**

In December of 2009, following a gang fracas at a party near Yakima, between Norteno gang members and Sureno members, a Honda with unidentifiable Norteno occupant(s) pursued several Sureno gang members down a Toppenish road, and fired shots at their car, killing one of them. Based on "leads" from persons of interest, Mr. Arredondo and one Rudy Madrigal were charged with murder and three counts of assault. Supp. CP \_\_\_\_, Sub # 6 (declaration of probable cause). The co-defendants were severed. It was undisputed that Mr. Arredondo was a member of the

Norteno gang. His defense was alibi; he testified that he left the house party where the Norteno-Sureno gang dispute had commenced, as a passenger in his friend Gabriel Limone's Impala and drove with him to his uncle Efrain's home in Yakima. 10/19/11RP at 740, 746-66. However, following the trial court errors, he was convicted, and he was sentenced to 1,083 months for the crimes and firearm enhancements. CP 99.

The issue at trial was identity -- whether Fabian Arredondo was one of the Nortenos in the pursuing Honda. 10/11/11RP Supp. 2B at 269-74, 275-278 (parties' opening statements); 10/10/11RP at 819-32, 834-45, 845-49 (parties' closing arguments). Maurice Simon, the State's jailhouse informant, claimed that the defendant told him he was the driver of the Norteno Honda. However, the trial court had prohibited all defense cross-examination into Simon's mental state at the time of trial or in the past, including medically-caused memory problems and substance addiction, despite his admissions to such problems. 10/18/11RP at 567-68.

Relying on the court's ER 404(b) ruling, the prosecutor told the jury in opening statement that the defendant back in February of 2009, "was driving a Mercedes to an area in Yakima, drove past a rival gang's location, and fired some shots there." 10/11/10RP Supp. 2B, at p. 273. In closing argument, the prosecutor argued this showed:

Motive, because it was a drive-by against a Sureno by a Norteno, the Defendant, similar to this homicide. Intent, because the Defendant drove specifically to that area and unloaded shots in that area. Identity, shows you who would do something like that, Norteno versus Sureno. Norteno versus Sureno, similar crime.

10/19/11RP at 831. The Court of Appeals affirmed and this Court granted review on the ER 404(b) issue and the right to cross-examine.

#### **D. ARGUMENT**

##### **I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED IMPROPER, IRRELEVANT, OVERLY PREJUDICIAL EVIDENCE OF AN ALLEGED PRIOR CRIMINAL ACT.**

###### **1. The defense moved to exclude all such testimony as mere suspicion, as irrelevant propensity evidence, and as more prejudicial than probative.**

Mr. Arredondo argued that admitting this suspicion of the alleged prior offense, based on shell casings, would obscure the issues because it was not charged in the case, and it could not be shown that it was conduct this defendant had engaged in. It did not involve him, or fit any of the ER 404(b) exceptions including motive or intent, or identity or anything admissible related to the charge he was facing trial for. 10/10/11RP Supp. at 22-23, 25. Mr. Arredondo also argued that admitting the officers' suspicions was unduly prejudicial because "now we're going to sort of be trying – it's almost like we're trying two cases against Mr. Arredondo in this trial." 10/10/11RP at 25-26.

The prosecutor summarized the physical facts of the bullet casing in the Mercedes, then said that the evidence was admissible for the purposes of common scheme and would show identity, because the issues in this homicide case involve “who were the individuals who were involved in the shooting of Mr. Ladislado Avila.” 10/10/11RP at 24-25.

The court ruled that the evidence had “probative value in identifying Mr. Arredondo’s animosity towards people who are of the Sureno persuasion, if you would, and it goes to show identity, and motive as well.” 10/10/11RP at 26-27. The court also stated that “under the circumstances, I believe that the probative value outweighs the prejudicial effect.” 10/10/11RP at 27. In the jury instructions, the court told the jury that the testimony could be considered for intent, identity and motive of the defendant. CP 63 (jury instruction no. 20).

**2. The State’s trial testimony was the same as the proffer – police officer suspicion, based on circumstantial physical evidence.**

Officer Dunn testified that in early February 2009, he had responded to a report of a shooting from a car passing a Toppenish house in a neighborhood of high gang activity. The homeowner told Dunn that the car “appeared to be like a Mercedes.” 10/17/11RP at 467-68. Officer Dunn found a shell casing lying on the street. 10/17/11RP at 468.

Later that month, Officer Hisey went to speak with Mr. Arredondo on an unrelated matter, and saw a Mercedes parked nearby; the officer testified he had searched it before and it had been in the control of Mr. Arredondo. 10/17/11RP at 481. Hisey obtained a set of car keys from Mr. Arredondo's pocket, or perhaps from his room. He testified that they were the keys for the Mercedes. 10/17/11RP at 481; see also 10/17/11RP at 485 (Officer Stine). In a search of the Mercedes, Hisey located a spent shell casing inside, which was submitted for analysis. 10/17/11RP at 481, 487. The firearms technician opined the shells were fired from the same gun, though he could not tell the type of gun. 10/17/11RP at 523-24, 535.

**3. ER 404(b) requires proof to the court of the prior criminal act, and prohibits evidence that is not relevant to a proper non-propensity purpose, or where prejudice outweighs probative value.**

This Court has stated that admission of prior criminal act evidence requires four analytical steps, described as:

- (1) the defendant's commission of the prior act must be "proved to the court by a preponderance of the evidence,"
- (2) the court must determine the non-propensity purpose the evidence is being proffered for,
- (3) the court must determine whether it is relevant to prove an element of the crime charged, and
- (4) the court must weigh the probative value against the prejudicial effect.

State v. Benn, 120 Wn. 2d 631, 653, 845 P.2d 289, 302 (1993); State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003). Because prior crimes

that are not the crime charged carry such propensity danger, their disallowance under ER 404(b) “tends to prevent confusion of issues, unfair surprise and undue prejudice.” State v. Slocum, 183 Wn. App. 438, 448, 456, 333 P.3d 541 (Div. 3, 2014) (citing Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)).

[A] trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b)[.]

State v. Powell, 126 Wn. 2d 244, 264, 893 P.2d 615 (1995); State v. Smith, 106 Wn.2d 772, 774-75, 725 P.2d 951 (1986) (“ER 404(b) must be read in conjunction with ER 402 and 403.”) (also stating that in close cases, ER 404(b) evidence must be excluded). Importantly, the ER 404(b) analysis must be conducted on the record. State v. Foxhoven, 161 Wn. 2d 168, 175–76, 163 P.3d 786 (2007) (citing State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)).

**4. Mere suspicion based on circumstantial evidence supported the defendant as being a person(s) who committed the February 2009 drive-by house shooting.**

“A prior bad act offered under ER 404(b) must be proved to the court by a preponderance of the evidence.” Benn, 120 Wn. 2d at 653 (citing State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

The defendant's Norteno gang affiliation was not a disputed issue. But there was not a preponderance of the evidence that Mr. Arredondo was responsible for the February drive-by crime, or even that it was committed by a Norteno, so as to allow the prosecutor to tout the prior incident in opening statement and closing argument, as established fact. See 10/11/10RP Supp. 2B, at p. 273; 10/19/11RP at 831; See, e.g., State v. Asaeli, 150 Wn. App. 543, 578, 208 P.3d 1136 (Div. 2, 2009) (prior Kushmen Blokk crimes not proved by preponderance where evidence of use of street names and the like, did not prove the past incident); United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993) (evidence defendants committed uncharged homicide insufficient for Fed. R. Evid. 404(b) where co-defendant's spouse said he said he did the act, but no one could identify perpetrators at scene) (citing Huddleston v. United States, 485 U.S. 681, 688-89, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)); State v. Acosta, 123 Wn. App. 424, 434, 98 P.3d 503 (2004) ("The arrests are unproved allegations and we have no way to evaluate whether the underlying act, or the intent behind the act, ever occurred.") (citing Benn, 120 Wn.2d at 653). A "preponderance" means proved more likely than not. State v. Kilgore, 147 Wn. 2d 288, 295, 53 P.3d 974 (2002). Without any indication that Mr.

Arredondo himself committed the crime of the drive-by past the house unloading gun shots, the preponderance standard was not met.

5.

**REDACTED – SEE RULING DATED  
AUGUST 25, 2016**

**REDACTED – SEE RULING DATED  
AUGUST 25, 2016**

**6. The stated purposes for offering the evidence were not evaluated on the record for a non-propensity purpose, or for relevance to an element, or balanced as to their probative value and prejudice.**

*(a). If the defendant is proved to have committed the prior criminal act, the court must identify the non-propensity purpose the evidence is being proffered for, and determine if it is relevant to prove an element. State v. Benn, 120 Wn. 2d at 653; State v. DeVincentis, 150 Wn.2d at 17, 23.*

Only then can ER 404(b) be properly applied, or reviewed. “The process of articulating the prejudice, and comparing it to probative value, ensures a ‘thoughtful consideration’ of their relative weight.” State v. Jackson, supra, 102 Wn.2d at 693-94 (and absence of that record precludes

effective appellate review). The words “intent, motive, and identity” are not magic invocations to circumvent the trial court as gatekeeper, or satisfy the court’s responsibility to conduct the thoughtful analysis. See State v. Saltarelli, 98 Wn. 2d 358, 364, 655 P.2d 697 (1982). In this case, because the trial court failed to conduct the ER 404(b) analysis on the record, this Court’s ability to review the reasoning behind the court’s ruling is entirely frustrated. Careful examination would have indicated that the proffered purposes do not satisfy ER 404(b).

**(b). Intent and Motive.** Mr. Arredondo was charged with intentional acts. Intent is almost always an element in criminal prosecutions, certainly for murder and assault. But “intent” is not a proper purpose for admissibility simply because the crimes charged include that *mens rea*. State v. Powell, 126 Wn.2d at 262 (prior misconduct is “necessary to prove a material issue” of intent only when “proof of the doing of the charged act does not conclusively establish intent”).

In regard to motive, the gang nature of the event was never in dispute; it was shown by the undisputed affiliations of the actors generally, and the circumstances of that night’s precipitating gang fracas specifically, that led directly to the pursuit and shooting of Surenos by unidentified Nortenos. 10/12/11RP at 64-70; 10/18/11RP at 681-84; 10/19/11RP at

751. See also Brief of Respondent in COA No. 30411-6-II, at p. 26 (“In this case there was never any question, doubt or challenge that the actors in this tragedy were members of rival gangs.”)

**(c). Identity.** In its ruling, the court merely stated a list of ER 404(b) purposes it was finding. If there is a non-propensity purpose that properly rendered the prior crime relevant to “identity,” it is unknown, because the court articulated no reasoning on the record. Identity *can* be proved by prior bad acts when the similarity of the incidents is so great that it shows a distinct *modus operandi* or signature of committing a crime. State v. Smith, at 777-78; State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002)); see Foxhoven, supra, 161 Wn.2d at 179. But the drive-by house shooting, and the car pursuit for murder and assaults, do not share the similarities needed to establish signature. There is no non-propensity argument that Mr. Arredondo must have been guilty for the December incident, because he did the February crime. Identity fails as a reason to introduce the prior uncharged crime.

**7. Even if relevant to a proper purpose, the prior criminal act was more prejudicial than probative -- “almost like we’re trying two cases against Mr. Arredondo in this trial.”**

The prior crime was relevant to no proper purpose; however, if step four is reached, this Court next reasons, “Because substantial

prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value.” State v. Lough, 125 Wn. 2d 847, 863, 889 P.2d 487 (1995). See State v. Gunderson, 181 Wn.2d 916, 923-24, 337 P.3d 1090 (2014) (final step of ER 404(b) implicates ER 401, 402 and 403); State v. Gresham, 173 Wn. 2d 405, 421, 269 P.3d 207 (2012) (ER 404(b) imports ER 403).

Probative value, if any, was greatly outweighed by prejudice. The danger of prejudice is greatest where the prior act is a crime but it was not subject of a conviction -- the jury may feel that the defendant should be punished somehow, for a broad swath of general criminal wrongdoing. United States v. Bradley, 5 F.3d at 1321. This Court has also said that trial courts must be wary of situations “where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d at 774-75. There was no relevance, but even if there was, this evidence was merely a conduit for the overwhelming propensity prejudice it carried. No reasonable trial court could conclude that the prejudice and confusion of the issues that was carried by this alleged prior crime nonetheless allowed it to be admitted in Fabian’s trial.

**8. Reversal is required.** Admitting a prior crime that is like the charged crime, whether for ER 404(b) or ER 609 purposes, risks the

greatest possible propensity prejudice. State v. Newton, 109 Wn.2d 69, 76-77, 743 P.2d 254 (1987); State v. Acosta, 123 Wn. App. at 438 (citing State v. Hardy, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997)); Bradley, 5 F.3d at 1321.

Here, trying the defendant for the December shooting murder based on the assertion he committed a house drive-by in February changed the outcome. The prosecution heavily on the prior crime in closing. 10/10/11RP at 819-32, 845-49. And the remaining evidence was not strong. Mr. Arredondo testified extensively as to his alibi. 10/19/11RP at 761-66. His uncle Efrain testified that Fabian came to his home in Yakima that evening and stayed the whole night. 10/18/11RP at 716-19, 734-35. The assault victims could only say they were followed and shot at by a Honda with tinted windows. 10/12/11RP at 70-72; 10/12/11RP at 182-85. As for Simon, although neither party tried to raise the issue of polygraphs, the jury wondered if Simon had actually taken the polygraph he promised in his informant agreement. 10/20/11RP at 860; CP 38 (jury note). Elena Guzman was asked if she told police that Arredondo and Rudy Madrigal told her they were doing dirty work that night and Arredondo was driving; she answered that this simply did not happen. 10/12/11RP at

96, 100, 121. Maria Vevallos testified that her brother told her he lent his Honda to some un-named friends. 10/17/11RP at 543-44.

The ER 404(b) evidence changed the outcome within reasonable probabilities, additionally, because the law officers' testimony came with a unique prejudice. Police officer testimony "often carries a special aura of reliability." State v. King, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009). The officers in this case were for all practical purposes allowed to state their opinions of Fabian's guilt to the prior drive-by. As Mr. Arredondo's counsel pleaded with the trial court, this was indeed like trying to defend against two criminal charges in one, which was deeply prejudicial, and caused unfair confusion of the issues. ER 404(b); ER 403; 10/10/11RP Supp. at 25-26. The ER 404(b) error in this case requires reversal of Mr. Arredondo's convictions.

## II. THE COURT ERRONEOUSLY EXCLUDED THE DEFENSE EVIDENCE REGARDING SIMON'S MENTAL STATE.

### **1. Impeachment of any witness is permitted under ER 607, and defense cross-examination to challenge the credibility and reliability of an important State's witness is a matter of right.**

ER 607 allows a party to impeach any trial witness. Generally, evidentiary matters are left to the trial court's discretion. State v. Darden, 145 Wn.2d 612, 622, 41 P.2d 1189 (2002). The mental conditions of a witness that bear on his ability to receive and remember, and to recall and

describe events accurately, are almost always relevant and admissible. See 5A Teglund, Washington Practice, Evidence Law and Practice, § 607.11, at pp. 400-01 and n. 2 (5th ed. 2007). Additionally, evidence of a witness's being affected by drugs at the time of the matter at hand (or when testifying), is also admissible for these same impeachment purposes. State v. Russell, 125 Wn. 2d 24, 81-84, 882 P.2d 747 (1994).

Furthermore, defense cross-examination of a witness to challenge credibility, including reliability, is generally a matter of right, rather than discretion. U.S. Const. amend. 6; Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

**2. Informant Simon revealed problems with truthfulness or accuracy in his previous informant work, because of his mental state including PTSD, along with ongoing methamphetamine addiction at the time of the claimed jailhouse conversation.**

***(a). Boasting in interview; motion to cross-examine; State's argument of "stigma."*** Mr. Simon stated in his defense interview, when questioned about his claims of Mr. Arredondo making a jailhouse admission, that "my recollection is all I can testify to," and he boasted that his informant deal with the Yakima prosecutor in this case included his agreement to submit to a polygraph examination, if needed. CP 20-25 (Defendant's motions *in limine*, at pp. 4-5) (citing interview, at p. 44).

Simon indicated he had not actually taken a polygraph, but he would. He further volunteered,

I've taken one before in the past. As a matter of fact it was on one of these cases I think, and I failed it. I suffer from PTSD, anxiety disorder and depression with intersensitive personality – interpersonality sensitivities I guess was where [sic] whole (inaudible) up there.

CP 23-24. Accordingly, the court later granted the defense request for subpoenas *duces tecum*, for records of Simon's treatment by psychologists for mental disorders in Yakima by Central Washington Comprehensive Mental Health. Then, Mr. Arredondo sought 1) to cross-examine Simon regarding his diagnoses and their effect on his ability to perceive and recall events accurately, and 2) to be allowed to introduce the mental health records if he denied the conditions. CP 24-25 (motions *in limine*, pp. 5-6).

As counsel noted to the court in seeking to cross-examine, the records contained several assessments, including in March of 2011, that were all signed by Simon in addition to the evaluator. They diagnosed Simon with "major depressive disorder, posttraumatic stress disorder, [and] amphetamine dependence," causing "concentration problems, short-term memory loss, needs to write things down or ask repeated questions, you know, and that's rated as moderate." 10/10/11RP Supp. at 4, 7-8

(counsel, noting that records said Simon “has a problem staying focused and comprehending,” which was consistent with defense interview).

***(b). Voir dire of witness – Simon denies these credibility issues and now boasts of superior recollection and ability to relate.*** In voir dire questioning on this issue, Simon denied ever stating that he had any condition, or mental disorder, that impacted his ability to remember, recall, or testify accurately about past events. 10/18/11RP at 557-61. In fact, he said, his psychiatric evaluator had told him his ability to recall and describe events was superior, because of his traumas in life. 10/18/11 RP at 558.

Simon was more expansive regarding substance abuse. He stated that, in addition to being addicted to alcohol, he had been addicted to methamphetamine but he had used it for the last time. 5RP 562. When asked when this was, he variously stated it was “six months ago,” “eight months ago,” or “[s]ix months 30 days,” and then explained it was when he had gotten out of jail twice; he had relapsed into methamphetamine use, and later decided he would “give it a try at being sober” because he then had a 60-day violation. 10/18/11RP at 563. Simon’s stint in jail -- during which he claimed that jailmate Arredondo had implicated himself in the

crime charged -- was in December of 2010, thus anywhere from 2 to 4 months before the end of Simon's methamphetamine abuse. CP 20-21.

Mr. Arredondo renewed his argument that counsel must be allowed to cross-examine Simon about his mental state, including his admitted methamphetamine addiction. Counsel also argued that the defense would now also be able to point out the fact of Mr. Simon "never answering the same question twice with the same answer." 10/18/11RP at 557-60, 567.

*(c). Trial court's ruling.* Nonetheless, the trial court ruled that there was no point in allowing the defense to cross-examine Simon about any mental states affecting perception or causing memory problems, since Simon would obviously deny it on the stand if asked. 10/18/11RP at 566 (the court reasoned, "So what's the point of asking the question if the answer's no?"). Additionally, the court stated that short-term memory had nothing to do with Simon's credibility because the jailhouse discussion was months ago. 10/18/11RP at 566-67.

The court also court stated there was low probative value to the idea that various diagnoses of mental disorders implicated Simon's ability to accurately recall events and testify. 10/19/11RP at 567-68. The court reasoned that under the defense theory, nicotine dependence was a

mental state that could be a basis to challenge a witness's credibility. 10/18/11RP at 567. On the other hand, the court ruled, it was enormously prejudicial *to the informant Mr. Simon*, to label him in front of the jury as a "mental case" who could not be believed. 5RP 567. The court therefore specifically prohibited all defense cross-examination into Mr. Simon's mental state now or in the past, including memory and any issues relating to substance abuse. 10/18/11RP at 567-68.

**2. The requested cross-examination was a matter of right, unless it was so prejudicial as to disrupt the basic fairness of the trial.**

The trial court assessed the question of prejudice on the basis of stigma to Mr. Simon, such as labeling him a mental case in front of the jury. This emphasis on Simon's embarrassment did not comport with the applicable constitutional standard. First, even as an evidentiary matter, in determining whether the probative value of proffered evidence is outweighed by its prejudicial effect under ER 403, the proper focus is on the trial process in general, not the witness or the opposing party. State v. Dickenson, 48 Wn. App. 457, 469, 740 P.2d 312 (1987) (citing State v. Hudlow, 99 Wn.2d 1, 13, 659 P.2d 514 (1983)).

Further, it was Mr. Simon *himself* who attributed his memory problems, including his ability to relate events in a reliable manner, to his mental conditions. Constitutionally, all of this was relevant defense

impeachment evidence, in which case it must be *allowed* as of right, unless the State has shown that the evidence is so prejudicial as to “disrupt the fairness” of the fact-finding process. State v. Jones, 168 Wn. 2d 713, 719-20, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d at 620-22 (citing U.S. Const. amend 6; Wash. Const. art. I, § 22; see Washington v. Texas, 388 U.S. at 23. Indeed, no government interest can bar highly probative defense evidence. Jones, at 720. Here, cross-examining Mr. Simon regarding his mental state and memory, including conditions he himself had said affected his truthfulness and accuracy in the past, would pose absolutely no disruption to the fairness of the fact-finding process at trial. To the contrary, this proposed cross-examination of Mr. Arredondo’s prime accuser would *be* the reliable fact-finding process. See also State v. Tigano, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991) (evidence of drug use or addiction is admissible). Simon’s own interview and *voir dire* showed that he had been diagnosed with conditions affecting his ability to recall and describe, along with active methamphetamine addiction that was ongoing at the relevant time. 10/18/11RP at 563.

Of course, trial courts have discretion to determine the scope of cross-examination as to a witness’ credibility where the claimed basis “is speculative or remote.” State v. Young, 89 Wn.2d 613, 628, 574 P.2d 1171,

cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). But in this case, the defense offer of proof and the request to cross-examine on these topics was highly relevant and not speculative, and certainly permitted under the evidence rules. Further, because Simon was such an important witness, precluding the defense cross-examination was a violation of Mr. Arredondo's 6<sup>th</sup> Amendment right to cross-examination.

**3. Reversal is required, including based on cumulative error.**

Reversal is required for the court's 6<sup>th</sup> Amendment error. Additionally, cumulative error requires reversal where the multiple errors in the case (here, including ER 404(b)) together caused reversible prejudice.

Washington v. Farnsworth, No. 91297-1 (June 23, 2016, at p. 6); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

A violation of the right to confront and impeach an important State's witness requires reversal unless the State can show the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). At trial, Simon claimed that while they were in jail together Mr. Arredondo seemed hesitant on the one hand but angry on the other, at times possibly was "venting" about people he appeared to be mad at, perhaps for discussing things. 10/18/11RP at 575. Simon claimed the defendant seemed to want to talk

about the current charges, and claimed Fabian said to him that he or compatriot(s) grabbed a firearm and he was driving when the December road shooting occurred. 10/18/11RP at 573, 577-80. In addition to asking Simon to remember exactly what the defendant allegedly said about participants, and firearms, the prosecutor elicited Simon's detailed assessment and memory of Mr. Arredondo's "demeanor" in terms of whether it was joking or serious, and what he "indicated" by it at the time. 10/18/11RP at 578-79, 583-84.

Yet instead of being able to ask Simon anything about his mental state and thus test his reliability, Mr. Arredondo was left essentially with showing Simon's prior convictions (unsurprising for a professional informant) and suggesting that Simon was testifying in hope of some vague benefit, which he admitted anyway. 10/18/11RP at 598-602. The primary and most important interest protected by the Confrontation Clause is the right to conduct cross-examination with all relevant evidence. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). But in this case the defense was unable to substantively attack the reliability of Simon's claims that Mr. Arredondo said he was driving the Honda that pursued the victims, crucial to the State's case which contained no fingerprints or DNA from the vehicle linking Fabian to the crime. The State's proof largely

consisted of Simon's tale, along with other evidence that certain people did, or did not say that the defendant made inculpatory-sounding assertions. 10/12/11RP at 96-97, 100 (Elena Guzman testimony). Additionally, as the defense emphasized, it never sought to inquire about polygraphs. Yet the jury *sua sponte* attested to its own emphasis on, and concern regarding, Simon's testimony, asking if Simon ever submitted to the polygraph that was part of his informant's cooperation agreement with the prosecution. CP 38 (jury note). The inability to impeach Simon by showing evidentiarily-supported grounds to believe he was not a mentally reliable reporter, or that he alternatively admitted and denied his own shifting claims of mental conditions affecting his memory, cannot be shown beyond a reasonable doubt to have not affected the verdict.

Furthermore, because the court prohibited the cross-examination, the issue of the effect of denials by Simon in terms of whether the medical records could then be introduced was never reached, but the matter would be one for the court's judgment. Upon such a denial by Mr. Simon in front of the jury, it would be well within the trial court's discretion to allow introduction of the records themselves, as Arredondo sought in his motion *in limine*. See ER 401; ER 402; ER 607; ER 613; see, e.g., 5A Tegland, Evidence, supra, § 607.12 at p. 404 (if a documented medical

impeachment topic is admissible, then extrinsic evidence, if admissible, may be introduced to show the matter, not just cross-examination). Whether by a multitude of ways, including inquiry, by reference to prior statements, and/or the medical records, Mr. Arredondo would have impeached Simon so the jury could have all fair information before it to evaluate the credibility and reliability of this crucial witness who, as to his mental state, boasted in *voir dire* that his disorders made him *better* than average in terms of "my ability to recall and describe events." 10/10/11RP Supp. at 558. Simon's weight with the fact-finder could have been eviscerated, if his reliability had been allowed to be confronted before the jury. For this error alone, but also for cumulative error, see Coe, 101 Wn.2d at 789, this Court should reverse Fabian Arredondo's convictions.

#### **E. CONCLUSION**

Based on the foregoing, Mr. Arredondo requests that this Court reverse his convictions.

Respectfully submitted this 4<sup>TH</sup> day of August, 2016.

s/ Oliver R. Davis  
Washington Bar Number 24560  
Washington Appellate Project-91052  
1511 Third Avenue, Suite 701  
Seattle, WA 98102  
Telephone: (206) 587-2711  
E-mail: Oliver@washapp.org

## Appendix A

**FILED**  
**SEPTEMBER 17, 2015**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30411-6-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
FABIAN ARREDONDO,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. —A jury found Fabian Arredondo guilty of second degree murder and three counts of first degree assault. Mr. Arredondo appeals, contending that (1) the trial court violated his constitutional public trial right, (2) the trial court abused its discretion in admitting ER 404(b) testimony of an earlier drive-by shooting, (3) the court erred in denying his motion to question a State witness regarding his mental state, (4) insufficient evidence supported the gang enhancement aggravating circumstance, and (5) the court abused its discretion in imposing the costs of incarceration legal financial obligation as part of his sentence. We disagree with Mr. Arredondo's first four contentions, but reverse the imposition of the per day legal financial obligations and remand for a new hearing in that regard.

FACTS

On the evening of December 5, 2009, three Sureño gang members went to a party together at a house in Toppenish, Washington. Most of the people at the party were members of the rival Norteño gang. Shortly after they arrived, several people exchanged angry words, and a brief fistfight ensued between one of the Sureños and two other people. Fabian Arredondo is a member of the Norteño gang, and he was at the party that evening but was not involved in the fight. Some of the Norteños at the party were carrying guns, but Mr. Arredondo was not seen with a gun.

Most people left the party after the fight. The three Sureños drove off in a white station wagon and picked up a fourth person who was walking along the street. They noticed another car from the party behind them and sped up to get away, but the car continued following them. The car following them was a Honda with tinted windows. Someone in the white station wagon said they saw a gun and yelled to duck. Shots were fired from the Honda, and one of the shots went through the window of the station wagon and hit the driver causing the station wagon to crash into a tree. The driver later died at the hospital. Mr. Arredondo was charged with first degree murder and three counts of first degree assault related to the December 5, 2009 drive-by shooting.

Before trial began, Mr. Arredondo filed a motion in limine to permit cross-examination of State witness, Maurice Simon, regarding Mr. Simon's mental health. Before making its ruling, the trial court allowed questioning of Mr. Simon regarding his

mental condition outside the presence of the jury. During that questioning, Mr. Simon revealed that he has problems with depression, concentration, comprehension, anxiety, distrust of other people, hypervigilance, post-traumatic stress disorder (PTSD), and substance abuse involving both alcohol and methamphetamine. Mr. Simon stated that while his substance abuse might affect his short-term memory, none of these problems affect his long-term memory. After this testimony, the court determined that none of Mr. Simon's issues affect his "ability to accurately recall and to describe the events or alleged events that he is going to be called upon to describe in his testimony." Report of Proceedings (RP) at 566-67. The court also concluded that the prejudicial effect outweighed the probative value of testimony regarding his mental health. The court barred any inquiry into Mr. Simon's mental state now or in the past, including his substance abuse.

Mr. Simon, who was Mr. Arredondo's cellmate in jail for five to eight days, testified Mr. Arredondo had talked about the December 5, 2009 drive-by shooting with him. Mr. Simon stated Mr. Arredondo had told him he was a member of the Norteño gang. Mr. Arredondo had also told Mr. Simon that the night of the shooting, he and his cousin Rudy had borrowed the keys to a Honda from someone at the house party they were at and chased down another vehicle that had also come from the party. Mr. Arredondo said he was driving with Rudy in the passenger seat, and when the cars were

No. 30411-6-III  
*State v. Arredondo*

side by side, Rudy had shot somebody in the other car. Finally, Mr. Arredondo had told him the people in the other car were from the rival Sureño gang.

Before trial, Mr. Arredondo also moved in limine to prohibit the State from introducing evidence of a drive-by shooting that occurred on February 9, 2009, under ER 404(b). The trial court denied the motion finding that the probative value outweighed the prejudicial effect.

During opening statements, the State told the jury it would hear evidence regarding the February 9, 2009 drive-by shooting. The prosecutor stated, "Mr. Arredondo was driving a Mercedes to an area in Yakima, drove past a rival gang's location and fired some shots there." RP Supp.-2B at 273.

Dustin Dunn, a detective for the Toppenish Police Department, testified he responded to a report of a drive-by shooting on February 9, 2009 in a "high gang area." RP at 468. The person who reported the shooting said the suspect's vehicle "appeared to be like a Mercedes." RP at 468. Detective Dunn found a .380 caliber shell casing in the street in front of the residence where the drive-by occurred. Before Detective Dunn's testimony regarding the incident in February 2009, the court gave a limiting instruction, stating,

There's going to be testimony that's offered, I believe starting now, regarding an incident that allegedly occurred on February the 9th of 2009.

That—the testimony regarding that particular incident can be considered by you in only one way. Okay? You can only consider it in

regard to the issue of whether—the issues of identity and motive and intent of the Defendant. Okay?

So you cannot consider it as to whether Mr. Arredondo may or may not be a bad person or may or may not have acted in a similar fashion on February the 9th of 2009 to what he's alleged to have done on December the 5th of 2009. You can only consider the testimony regarding the incident of February 9, 2009, only on the issues of motive, intent, and identity.

RP at 466.

Michael Hisey, community corrections officer for the Washington State Department of Corrections (DOC), testified that on February 23, 2009, he and two other officers contacted Mr. Arredondo at an address in Zillah, Washington, based on reports he was selling drugs out of the residence. A silver Mercedes was parked in the area, and Mr. Arredondo had possession of the keys to the Mercedes. The officers searched the vehicle and found a .380 caliber shell casing. Before Corrections Officer Hisey's testimony, the court referenced the limiting instruction given regarding Detective Dunn's testimony and stated that the same instruction applied.

Terry Franklin, a forensic scientist from the Washington State Patrol Crime Laboratory, analyzed both .380 shell casings and found they were fired from the same firearm.

Jaban Brownell, a detective for the Toppenish Police Department, testified that the residence where the February 9, 2009 drive-by shooting occurred is located in an area of Toppenish populated by members of the Sureño gang. Detective Brownell stated that the

No. 30411-6-III  
*State v. Arredondo*

rival Norteño gang was involved in that shooting. Detective Brownell also testified more generally about the characteristics of street gangs, stating, “[A]s you work up the gang life-style, the more credit you have as far as crimes you’ve committed, how much you’ve hustled . . . you earn a certain level of prestige and respect amongst the gang members and even rival gang members.” RP at 684.

After the State rested, Mr. Arredondo moved to dismiss the gang enhancement aggravating circumstance, arguing that there was insufficient evidence to support the aggravator. The court denied his motion, finding sufficient evidence in the record to support the gang enhancement allegations.

The jury found Mr. Arredondo guilty of second degree murder and three counts of first degree assault. The jury also found by special verdict that Mr. Arredondo committed the crimes with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership. The court imposed an exceptional sentence of an additional 60 months’ incarceration per count for this aggravating circumstance. The court ordered the sentences for each count to run consecutively. The sentence totaled 1,083 months.

The court also entered a finding, without inquiring on the record, that Mr. Arredondo had the ability to pay legal financial obligations (LFOs). One of the LFOs imposed was the costs of incarceration at a rate of \$50 per day, or in excess of \$1.6 million.

No. 30411-6-III  
*State v. Arredondo*

Mr. Arredondo appeals, contending that (1) the trial court violated his constitutional public trial right by excluding the public from a portion of the jury selection, (2) the trial court abused its discretion in admitting ER 404(b) testimony related to the February 9, 2009 drive-by shooting, (3) the trial court erred in denying his motion to question the State's witness Maurice Simon regarding his mental state, (4) insufficient evidence supported the gang aggravating circumstance, and (5) the trial court abused its discretion in imposing \$50 per day costs of incarceration as part of his sentence.

Mr. Arredondo filed a motion on March 6, 2013, to remand the case to the trial court for the taking of additional evidence related to the public trial issue. A commissioner of this court issued a ruling ordering remand on March 7, 2013.

The trial judge presided over the reference hearing held June 27, 2013. Testimony revealed the Yakima County Courthouse hours were 8:00 a.m. to 4:00 p.m. at the time of Mr. Arredondo's trial. Courthouse policy was that if a trial continued past 4:00 p.m., the staff of the court would call courthouse security and security would keep the courthouse doors open with security personnel posted at the doors. If a session of trial went past 4:00 p.m., the policy was also to allow any members of the public wanting to watch Mr. Arredondo's trial to be admitted to the courthouse and directed to a courtroom. Also, if enough security officers were available, the officers would check whether any courts were still in session past 4:00 p.m.

No. 30411-6-III  
*State v. Arredondo*

Jury selection began on October 10, 2011, and continued on October 11. The report of proceedings reflects that the October 10 session ended at 4:11 p.m. During the October 11 session, the court mentioned the new security policy wherein security officers lock the doors to the courthouse at 4:00 p.m. The court intended to adjourn by 4:00 p.m. every day of the trial to avoid any potential violations of Mr. Arredondo's right to a public trial. Later that day, the court stated:

[W]e need to finish the jury selection this afternoon, because there's another trial starting tomorrow that's going to be in this courtroom and that they're going to be using Courtroom 3 for jury storage.

....  
So, I'll make the finding . . . that the need to conclude the jury selection process this afternoon is an extraordinary circumstance warranting us going past four o'clock and potentially conducting . . . some small portion of the jury selection process in an open courtroom in a locked courthouse.

RP Supp.-2B at 239-40. The report of proceedings reflects that on October 11 jury selection was completed at 4:17 p.m. The court then read the preliminary instructions to the jury members and dismissed the jury and adjourned court at 4:24 p.m.

The sign posted on the exterior entrance door at the time of the trial stated,

COURTHOUSE  
CLOSES AT 4 PM.  
AUDITOR @ 3:30.  
COURT HEARINGS  
UNTIL 5 PM.

State's Ex. L. The sign posted inside the courthouse near the entrance said,

No. 30411-6-III  
*State v. Arredondo*

COURTHOUSE  
CLOSES AT 4 PM.  
OFFICE HOURS  
AUDITOR 9-3:30  
HR 9-4:00  
DC CLERKS 8-4:00  
SC CLERKS 8:30-4:00  
ALL OTHERS 8-4:00  
COURT CLOSES @ 5 PM.

State's Ex. M.

Howard Delia, consultant for the Yakima court system, testified that he never received a complaint that a member of the public wanted to see a trial after 4:00 p.m. but was denied access to the courthouse. Mr. Delia admitted on cross-examination that the signs could be interpreted to mean a person would have to actually be inside the building prior to 4:00 p.m. to attend a court session going beyond 4:00 p.m.

Testimony also revealed a person approaching the entrance doors would see the sign on the door but would not be able to see the security officer posted by the metal detector or in the office. However, a member of the public could see the security officer by the metal detector if he or she entered the first set of entrance doors and looked through the second set of doors.

Kacy Siebol, a security officer on duty on the days in question, testified he did not believe a member of the public who approached the entrance door and read the sign could see any of the officers on duty because none of the officers stand directly in front of the doors. Officer Siebol did not recall where in the building he was posted on the days in

question. Officer Siebol acknowledged on cross-examination that there could have been members of the public who approached the entrance doors, read the sign, and then left without trying to get the security officer's attention.

Ron Rogers, another security officer on duty on the days in question, testified that the security procedure around the time of Mr. Arredondo's trial was to lock the doors at 4:00 p.m. If a member of the public wanted in the building to watch the trial, he or she would need to knock or pull on the door to get the security officer's attention. The officer would then ask the person why he or she was there, and if the person indicated it was for court, the officer would allow that person to enter the building.

The court entered findings of fact and conclusions of law for the reference hearing. The court found that on October 10, 2011,

the court hearings concluded before 4 p.m. because the clock or time listed on the transcript for October 10, 2011 was in error because no two clocks in this courthouse have the same time. The time stamp on the [Jefferson Audio Visual System (JAVS)] recording system, which is reflected in the report of proceedings, is not synced to the actual time and is off by a significant amount. There is a discrepancy in the clerk's minutes in comparison to the JAVS times on the transcript. The courtroom clocks are also ahead by about six minutes. The court used the bench computer, which accurately reports the time, to keep track of the hour.

Clerk's Papers (CP) at 112. As for the session on October 11, 2011, the court found that the judge anticipated having to go past 4:00 p.m. and thus properly conducted a *Bone-*

*Club*<sup>1</sup> analysis when it concluded it was necessary to continue the proceedings to complete jury selection that day. Additionally, “the amount of time between the jury being sworn and the adjournment was only for a few minutes. On the 11th of October, the court was recessed at 4:10 not at 4:17, which is the incorrect time, from the JAVS recording noted n [sic] the report of proceedings.” CP at 113. The court also found that on October 10-11, 2011, “the public entrance of the Yakima County Courthouse was not closed or locked at 4:00 p.m. because a courtroom was still in session in which case security officers kept the public entrance open until all courts were no longer in session for that day.” CP at 114. Thus, the court concluded that Mr. Arredondo’s public trial rights were not violated.

#### ANALYSIS

*1. Whether the trial court violated Mr. Arredondo’s constitutional public trial right*

Mr. Arredondo contends the trial court violated his constitutional right to a public trial when it held a portion of jury selection in an open courtroom but a closed courthouse. The State argues that no violation of his public trial right occurred because members of the public still had access to the courthouse for purposes of watching court hearings going past 4:00 p.m. when the courthouse officially closed.

---

<sup>1</sup> *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

The State also contends that Mr. Arredondo's failure to raise this issue in the trial court precludes him from raising it on appeal. However, "[d]efendants can raise claims of public trial rights violations for the first time on appeal." *State v. Andy*, 182 Wn.2d 294, 301, 340 P.3d 840 (2014). Such claims receive de novo review on appeal. *Id.* It is the defendant's burden to provide a record that establishes a closure occurred. *Id.*

A defendant's constitutional right to a public trial extends to jury selection. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). Any affirmative act by the trial court to fully close a courtroom to spectators during jury selection is a violation of the public trial right, unless the court enters findings justifying the closure under the requirements of *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). *Bone-Club* requires an on-the-record, case-by-case weighing of the following five factors:

"1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.

"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose."

No. 30411-6-III  
*State v. Arredondo*

128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Here, during the October 11, 2011 hearing, the court stated:

[W]e need to finish the jury selection this afternoon, because there's another trial starting tomorrow that's going to be in this courtroom . . . .

. . . .  
. . . I'll make the finding that the need to conclude the jury selection process this afternoon is an extraordinary circumstance warranting us going past four o'clock and potentially conducting . . . some small portion of the jury selection process in an open courtroom in a locked courthouse.

RP Supp.-2B at 239-40. The report of proceedings reflects that jury selection was completed at 4:17 p.m. The court then read the preliminary instructions to the jury members and dismissed the jury and adjourned court at 4:24 p.m. After the reference hearing, the court found that it had properly conducted a *Bone-Club* analysis. On appeal, Mr. Arredondo contends that the court's statement quoted above from the October 11 hearing did not constitute a sufficient *Bone-Club* analysis.

However, if the trial court does not actually close the courtroom during jury selection, the court need not engage in a *Bone-Club* analysis. See *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). On remand, the court heard testimony from court officials and security officers. Based on this testimony, the court entered findings that all members of the public were able to access the courtroom at all times during the trial and that no member of the public was deterred by the sign posting the courthouse hours. Specifically, the court found that on October 10 and 11,

the public entrance of the Yakima County Courthouse was not closed or locked at 4:00 p.m. because a courtroom was still in session in which case security officers kept the public entrance open until all courts were no longer in session for that day. Yakima County's policy was that the public entrance remained open as long as any courtroom was in session. The courts and security officers followed this policy.

CP at 114. Mr. Arredondo challenges the sufficiency of the evidence to support these findings.

This court reviews findings from a reference hearing for substantial evidence. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999). As long as some reasonable interpretation of the evidence supports the trial court's findings, this court will not reweigh any conflicting evidence. *Id.* at 411. And credibility determinations are for the trier of fact. *Id.* at 410-11.

The facts revealed at the reference hearing in this case are nearly identical to those in the recently-decided *Andy* case, where the Washington Supreme Court upheld the remand court's finding that no closure occurred. 182 Wn.2d at 301-02. Both cases were tried at the Yakima County Courthouse, and the signs posted on the courthouse door during both trials used the same language. However, there are two differences between this case and *Andy*. For one, the court in *Andy* concluded, "[T]he evidence shows that at all times during Andy's trial proceedings, the door to the courthouse was *unlocked* . . . ." *Id.* at 297.

Here, the parties presented conflicting evidence as to whether the outside courthouse doors were locked. Several courthouse security officers testified that the general policy of the court at the time of Mr. Arredondo's trial was to leave the external courthouse doors unlocked and to post security officers at the doors to greet and direct any members of the public trying to enter the courthouse after the courthouse's official closure at 4:00 p.m. to the hearing he or she wanted to attend. However, Ron Rogers, one of the two security officers on duty at the time in question, testified that the security procedure around the time of Mr. Arredondo's trial was to lock the doors at 4:00 p.m. If a member of the public wanted in the building to watch the trial, he or she would need to knock or pull on the door to get the security officer's attention. The officer would then ask the person why he or she was there, and if the person indicated it was for court, the officer would allow that person to enter the building.

The second difference between this case and *Andy* is that while the court in *Andy* concluded, "All of the evidence indicates that the sign presented no obstacle to members of the public who wished to attend the trial," 182 Wn.2d at 302, here, two witnesses admitted that the sign could be a deterrent. Officer Kacy Siebol, the second officer on duty during the time in question, acknowledged on cross-examination that there could have been members of the public who approached the entrance doors, read the sign, and then left without trying to get the security officer's attention. Howard Delia, consultant for the Yakima court system, also admitted on cross-examination that the signs could be

No. 30411-6-III  
*State v. Arredondo*

interpreted to mean a person would have to actually be inside the building prior to 4:00 p.m. to attend a court session going beyond 4:00 p.m.

Despite these two differences, we believe that the outcome here should be the same as *Andy*. First, even if the courthouse doors were locked, officers were present to admit members of the public trying to enter. The courtroom itself was not locked. Second, while the courthouse signs may have been worded poorly, this court does not reweigh conflicting evidence where the evidence can reasonably be interpreted to support the trial court's finding that the signs did not deter members of the public. Thus, substantial evidence supports the court's findings from the reference hearing.

Finally, Mr. Arredondo relies on *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) in his briefing, but this reliance is misplaced. In *Strode*, the court allowed questioning of at least 11 prospective jurors in chambers, and 6 of them were challenged for cause, all out of the presence of the public. 167 Wn.2d at 227. Here, jury selection took place in an open courtroom, not in the judge's chambers.

We conclude that there was no courtroom closure and, therefore, we need not address Mr. Arredondo's *Bone-Club* argument.

2. *Whether the trial court abused its discretion in admitting ER 404(b) testimony of other acts*

Mr. Arredondo contends the trial court abused its discretion in allowing evidence of an earlier drive-by shooting contrary to ER 404(b) where there was insufficient proof that he was the perpetrator of the other act.

ER 404(b) provides that evidence of other crimes or acts is not admissible to show that a person acted in conformity with his character but is admissible for other purposes. These other purposes include proof of motive, intent, and identity. Where, as here, the State seeks admittance of an uncharged crime, the trial court must “(1) find by a preponderance of the evidence that the uncharged acts probably occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is relevant to that purpose, and (4) balance the probative value of the evidence against its prejudicial effect.” *State v. Stein*, 140 Wn. App. 43, 65, 165 P.3d 16 (2007). This court reviews a trial court’s admission of ER 404(b) evidence for an abuse of discretion. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

Here, Mr. Arredondo moved in limine to prohibit the State from introducing evidence under ER 404(b) of a drive-by shooting that occurred on February 9, 2009. In support of his motion, Mr. Arredondo argued that he was never charged for the offense, which occurred 10 months earlier, and the State sought to introduce evidence that was insufficient to prove his involvement. Additionally, the February 2009 shooting did not

No. 30411-6-III  
*State v. Arredondo*

involve any of the same people as the December 2009 shooting at issue in this case. Thus, he argued the other crime evidence did not fall within one of the exceptions to ER 404(b) and was unduly prejudicial. The State then described the evidence it planned to offer related to the February 2009 shooting and argued that it was offering this evidence to show both common scheme or plan and identity. The State argued that the evidence was relevant and its probative value outweighed the prejudicial effect.

After these arguments from both sides, the trial court denied the defense motion in limine. In reaching its decision, the court stated:

Well, it's as—I think under [ER] 404(b) it has probative value. I think the probative value in identifying that is Mr. Arredondo's animosity towards people who are of the Sureño persuasion, if you would, and it goes to show identity, and motive as well.

So, under the circumstances, I believe that the probative value outweighs the prejudicial effect. I'll allow testimony regarding the earlier incident.

RP (Oct. 10, 2011, Suppl.) at 26-27. During the trial, the court gave a limiting instruction to the jury before testimony related to the February 2009 shooting, stating:

[T]he testimony regarding that particular incident can be considered by you in only one way. Okay? You can only consider it in regard to the issue of whether—the issues of *identity* and *motive* and *intent* of the Defendant. Okay?

So you cannot consider it as to whether Mr. Arredondo may or may not be a bad person or may or may not have acted in a similar fashion on February 9th of 2009 to what he's alleged to have done on December the 5th of 2009.

RP at 466 (emphasis added).

On appeal, Mr. Arredondo takes issue with the first and the last elements of the four-part analysis for admissibility of an uncharged crime under ER 404(b). While the court's oral ruling focused on the fourth element, its analysis was sufficient as to the other elements as well.<sup>2</sup> The State presented evidence of two shell casings fired from the same weapon; one was found outside the Toppenish residence where the February 9, 2009 drive-by shooting occurred and another was found in a Mercedes parked outside the residence where Mr. Arredondo was contacted by police a couple of weeks later. Mr. Arredondo had possession of the keys to the Mercedes at that time. The person who reported the February 2009 shooting said the suspect's vehicle "appeared to be like a Mercedes." RP at 468. Testimony also revealed the address where the shooting occurred was in a high gang area populated by Sureños. This evidence is sufficient to prove by a preponderance that the uncharged acts probably occurred. Thus, the first element of the four-part analysis was satisfied.

The trial court's analysis as to element four was also sufficient. The court stated that the probative value of the evidence was to demonstrate Mr. Arredondo's animosity

---

<sup>2</sup> "A trial court may determine that uncharged crimes probably occurred based solely on the State's offer of proof." *Stein*, 140 Wn. App. at 66. And where a court's ruling regarding the admissibility of ER 404(b) evidence immediately follows arguments by both sides on the matter "and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings." *Id.* While the trial court did not explicitly state that it found by a preponderance of the evidence that Mr. Arredondo was probably involved in the February 2009 drive-by shooting, the record is sufficient to show that the court made this finding before reaching its decision.

toward rival Sureños. The purposes for which the trial court admitted this evidence were motive, intent, and identity. The court determined that the probative value outweighed the prejudicial effect. Because this weighing determination is the province of the trial court, not the appellate court, we are reluctant to determine otherwise. We find no abuse of discretion in the admission of the ER 404(b) evidence related to the February 9, 2009 drive-by shooting. *See State v. Herzog*, 73 Wn. App. 34, 50, 867 P.2d 648 (1994).

3. *Whether the trial court erred in denying Mr. Arredondo's motion to question a State's witness regarding his mental state*

Mr. Arredondo argues his Sixth Amendment right of confrontation was violated when the trial court barred any inquiry into the mental state of State witness, Maurice Simon, during cross-examination. The State contends that the witness did not exhibit any mental disability while on the stand and was clearly competent, and thus the trial court properly exercised its discretion to deny the motion.

“The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine adverse witnesses.” *State v. Perez*, 139 Wn. App. 522, 529, 161 P.3d 461 (2007). This right is not absolute and is subject to the following limits: “(1) the evidence sought to be admitted must be relevant and (2) the defendant’s right to introduce relevant

evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*

It is fundamental that a defendant in a criminal trial be given great latitude in cross-examining witnesses on credibility. *State v. Peterson*, 2 Wn. App. 464, 466, 469 P.2d 980 (1970). Generally, the trial court has discretion to admit evidence of a witness's mental condition for impeachment purposes. *State v. Froehlich*, 96 Wn.2d 301, 306, 635 P.2d 127 (1981). Mental deficiency impeachment evidence is relevant when the deficiency is readily apparent and the witness's competency is a central issue in the case. *Id.* at 306-07. Absent abuse of discretion, this court will not reverse a trial court's ruling regarding the scope of cross-examination. *Perez*, 139 Wn. App. at 529-30.

The *Perez* court found an abuse of discretion where the trial court did not allow the defendant to question the witness regarding his mental state at the time of trial even though the witness "had given confused and inarticulate testimony, and . . . the trial court observed that [the witness] appeared confused and disoriented." *Id.* at 530. In *Froehlich*, the court upheld the trial court's decision to permit a psychiatrist to testify about a witness's mental condition where the witness testified on direct examination regarding his mental state and the witness's nervous condition was readily apparent while he was on the witness stand. 96 Wn.2d at 304-05, 308.

The facts in this case are distinguishable from both *Perez* and *Froehlich*. Unlike the witnesses in both of those cases, Mr. Simon did not display any readily apparent

mental deficiencies while on the witness stand. The court permitted questioning of Mr. Simon regarding his mental condition outside the presence of the jury. During that examination, counsel for appellant referenced three mental health evaluations that revealed Mr. Simon has problems with depression, concentration, comprehension, anxiety, distrust of other people, hypervigilance, PTSD, and substance abuse of both alcohol and methamphetamine. However, Mr. Simon testified that while his substance abuse might affect his short-term memory, none of these issues affect his long-term memory. Mr. Arredondo did not produce any evidence to the contrary.

Division Two of this court has held that evidence of drug use is only admissible to impeach a witness if there is a reasonable inference that the witness was under the influence of drugs either at the time of the incident or at the time of testifying at trial. *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). Here, there is no evidence Mr. Simon was under the influence at the time he shared a cell with Mr. Arredondo or while testifying. In addition, allowing Mr. Simon to testify as to these problems that have no effect on his long-term memory would not have aided the jury in its credibility determination of Mr. Simon's ability to "observe, recollect and communicate truthfully." *Froehlich*, 96 Wn.2d at 307. We conclude that the trial court did not abuse its discretion when it barred defense cross-examination of Mr. Simon's mental state.

4. *Whether there was sufficient evidence to support the street gang aggravator*

Mr. Arredondo next contends that there is insufficient evidence to support the street gang aggravating factor. He contends the only evidence presented was that Mr. Arredondo was a member of the Norteño gang, the victim was a Sureño gang member, and the Norteños and Sureños are rival gangs. He argues that based on these facts alone, it would be conjecture to presume these crimes were committed for the reasons stated in the aggravating circumstance.

This court will review “a jury’s verdict on an aggravating factor for substantial evidence just as [it does] when evaluating the sufficiency of the evidence supporting the elements of a crime.” *State v. DeLeon*, 185 Wn. App. 171, 212, 341 P.3d 315 (2014). “After viewing the evidence in a light most favorable to the State[,] we ask whether any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt.” *Id.* In this case, the relevant statute, RCW 9.94A.535(3)(aa), requires the State to prove beyond a reasonable doubt that Mr. Arredondo’s involvement in the drive-by shooting was based on his desire “to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.”

In *State v. Moreno*, 173 Wn. App. 479, 495-97, 294 P.3d 812 (2013), *review denied*, 177 Wn.2d 1021 (2015), this court affirmed the trial court’s imposition of an exceptional sentence under RCW 9.94A.535(3)(aa). At trial, the State presented

evidence that (1) Mr. Moreno had ties to the Norteños, (2) that he and his cohorts were found in Sureños territory without a credible reason immediately after the shooting was reported, and (3) somebody in Mr. Moreno's car yelled out a gang-related phrase moments before the shooting. *Id.* at 496-97. Additionally, a gang expert testified that the Norteños and Sureños were rivals, both gangs were territorial and would not invade rival gang turf without a specific reason, and gang members often commit random acts of violence as a way to maintain or improve their status within the gang. *Id.* at 497. From these facts, this court concluded, "[T]he evidence shows a sufficient nexus between the crime and gang membership to prove the gang aggravator." *Id.*

Similarly, in *DeLeon*, this court concluded the evidence was sufficient to support the gang aggravator's application to all three defendants. 185 Wn. App. at 212-13. The operative facts were (1) that the defendants' gang membership was abundantly demonstrated in the record, (2) that there was a gang-related motivation for their presence in a Sureño neighborhood and for their shooting at a Sureño-associated home, (3) that the defendants were wearing red bandannas over their faces, and (4) that the shooting was a response to the victim flashing a rival gang sign. *Id.* And again, the State provided expert testimony regarding gang culture and retaliation specific to the Norteño gangs. *Id.* at 213.

Here, Mr. Arredondo admitted that he is a member of the Norteños and that he had become a member after growing up in the gang lifestyle. Additionally, testimony

No. 30411-6-III  
*State v. Arredondo*

revealed that Mr. Arredondo was at a house party with other Norteños the night of the shooting. Some of the Norteños at the party were carrying guns. The victim and his friends, some of who were members of the rival Sureño gang, arrived at the party. Shortly thereafter, an altercation occurred between members of the rival gangs. Most people left the party after the fight, including the victim and his friends, and the drive-by shooting followed. Detective Brownell, assigned as the street crimes detective for the Toppenish Police Department, testified regarding the rivalry between the Norteños and Sureños, as well as what parts of the city are controlled by which gang. He also testified generally regarding the gang lifestyle wherein members “earn a certain level of prestige and respect amongst the gang members and even rival gang members” based on the number of crimes they have committed and how much they have hustled. RP at 684. Thus, this evidence, which is comparable to the evidence in both *Moreno* and *DeLeon*, establishes the required nexus between the drive-by shooting and Mr. Arredondo’s motivations to benefit his gang.

5. *Whether the trial court erred when imposing the \$50 per day legal financial obligation as part of Mr. Arredondo’s sentence*

The sentencing court ordered Mr. Arredondo to pay the costs of incarceration at a rate of \$50 per day for the term of the prison sentence of 1,083 months. The judgment and sentence contained a generalized finding of financial ability, which included the following language:

**2.7 Financial Ability:** The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

CP at 91. The judgment and sentence also included a separate finding specific to the costs of incarceration, which read:

**4.D.4 Costs of Incarceration:** In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration . . . and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).

CP at 94. Other than these preprinted, boilerplate findings, no evidence in the record relates to Mr. Arredondo's financial means. Mr. Arredondo challenges the trial court's imposition of the costs of incarceration. He contends that the sentencing court failed to make an individualized inquiry as to whether he had the means to pay these LFOs as required by RCW 9.94A.760(2). It is undisputed that Mr. Arredondo raises this issue regarding LFOs for the first time on appeal. For this reason, the State contends this court should decline review.

"A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). RAP 2.5(a) provides that an "appellate court may refuse to review any claim of error which was not raised in the trial court." The rule then goes on

No. 30411-6-III  
*State v. Arredondo*

to provide three exceptions that allow an appeal as a matter of right. RAP 2.5(a). Mr. Arredondo does not argue that one of the RAP 2.5(a) exceptions applies. In *Blazina*, the Washington State Supreme Court recently confirmed an appellate court's discretion under RAP 2.5(a) extends to review of a trial court's imposition of discretionary LFOs. 182 Wn.2d at 833-35.

*Blazina* involved LFOs authorized by RCW 10.01.160(3). There, the court held that under RCW 10.01.160(3), "sign[ing] a judgment and sentence with boilerplate language stating that it engaged in the required inquiry" is insufficient and that instead, a sentencing court must make an "individualized inquiry into the defendant's current and future ability to pay" on the record. *Blazina*, 182 Wn.2d at 838. Here, the LFOs at issue are the costs of incarceration, which are governed by RCW 9.94A.760(2). Although different in language, both statutes include an imperative that the court make a determination regarding the defendant's ability to pay when imposing a discretionary cost. Compare RCW 9.94A.760(2) (stating "If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration . . . .") with RCW 10.01.160(3) (stating "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them."). *Blazina* applies here.

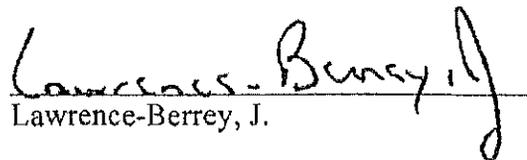
No. 30411-6-III  
*State v. Arredondo*

Thus, this court has the discretion to decline review of Mr. Arredondo's discretionary LFOs. In this case, we consider the administrative burden and expense of bringing Mr. Arredondo to a new sentencing hearing and the likelihood that the LFO result would change. An important consideration of this analysis is the dollar amount of discretionary LFOs imposed by the sentencing court.

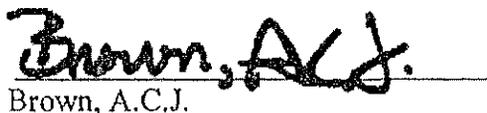
Here, the trial court imposed over \$1.6 million of discretionary LFOs against Mr. Arredondo. We conclude that the administrative burden and expense of bringing Mr. Arredondo back for resentencing is minor in comparison to the likelihood that the LFO result will change.

We affirm in part, but reverse and remand the imposition of the \$50 per day LFO for a new sentencing hearing, or, possibly entry of an agreed order amending the judgment by striking the \$50 per day costs. In the event that such an agreed order is entered, Mr. Arredondo's personal presence will be unnecessary.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Lawrence-Berrey, J.

I CONCUR:

  
Brown, A.C.J.

30411-6-III

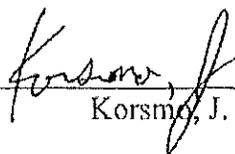
KORSMO, J. (dissent) — I concur in all but the majority's decision to remand this case for a hearing concerning the discretionary legal financial obligations (LFOs). I would decline to reach the LFO issue in this case because the existing order has no practical consequences for Fabian Arredondo. If he should leave prison and be subject to the LFO order, it will not be until the dawn of the 22nd century.

Mr. Arredondo, age 30 at the time he committed these crimes, faces 20 years in prison "straight time" before gaining the opportunity to earn early release credit at the rate of 15 percent against the remaining 843 months on his sentence. With maximum credit, he will be nearing his 110th birthday before he need worry about the impact of these LFOs on his life, and that assumes he already will have paid nearly \$20,000 of restitution and mandatory court costs before these discretionary costs might come due. Clerk's Papers at 93-94. There will be plenty of time to put the question to the trial court should it become anything other than an academic query.

For that matter, Mr. Arredondo has other current options to put the question of his LFOs before the trial judge. He could bring a timely motion under CrR 7.8(b). He could seek remission of his obligations under RCW 10.01.160(4). He has the opportunity to raise the issue if he genuinely wants to do so.

We have noted in the past that a defendant facing sentencing has great incentive not to raise the question of his ability to pay financial obligations. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014), *review granted*, 353 P.3d 641 (2015). For that reason, we have declined to hear these claims when raised initially on appeal. *Id.* at 253. The Washington Supreme Court agreed that we have discretion to hear or decline to hear this issue. *State v. Blazina*, 182 Wn.2d 827, 832-834, 344 P.3d 680 (2015). Given the forceful language of *Blazina*, I have little doubt that trial judges in the future will live up to their statutory obligation to inquire about ability to pay at sentencing, to the probable consternation of many of those appearing before them.<sup>1</sup>

But sentencing in this case occurred four years before *Blazina* and I see nothing to be gained here by putting the county to the expense of a resentencing in a case that already had presented significant security concerns. Accordingly, I respectfully dissent from the decision to return this case to the trial court for consideration of the discretionary LFOs.

  
Korsmo, J.

---

<sup>1</sup> By remanding, the majority wrongly assumes that it was error to impose the incarceration costs. We cannot tell that on this record. The court's error, if there was one, was in ordering the costs without conducting the necessary inquiry into Mr. Arredondo's ability to pay. Although highly unlikely, the outcome of that inquiry might show that he does have the ability to pay.

FILED  
OCTOBER 13, 2015  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF  
WASHINGTON**

STATE OF WASHINGTON,	)	No. 30411-6-III
	)	
Respondent,	)	
	)	ORDER GRANTING
v.	)	MOTIONS TO PUBLISH
	)	
FABIAN ARREDONDO,	)	
	)	
Appellant.	)	

The court has considered the appellant's and the respondent's motions to publish the court's opinion of September 17, 2015, and the record and file herein, and is of the opinion the motions to publish should be granted. Therefore,

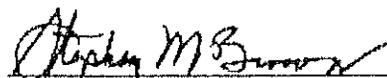
IT IS ORDERED the motions to publish are hereby granted. The opinion filed by the court on September 17, 2015, shall be modified on page 1 to designate it is a published opinion and on page 28 by deletion of the following language.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

DATED: October 13, 2015

PANEL: Judges Lawrence-Berrey, Brown, and Korsmo

BY A MAJORITY:

  
STEPHEN M. BROWN  
ACTING CHIEF JUDGE



# WASHINGTON APPELLATE PROJECT

August 04, 2016 - 4:09 PM

## Confirmation of Filing

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 92389-2  
**Appellate Court Case Title:** State of Washington v. Fabian Arredondo

### The following documents have been uploaded:

- 923892\_20160804160821SC563867\_9347\_Briefs.pdf  
This File Contains:  
Briefs - Petitioners Supplemental  
*The Original File Name was washapp.org\_20160804\_154356.pdf*

### A copy of the uploaded files will be sent to:

- jennifer.joseph@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- oliver@washapp.org
- David.Trefry@co.yakima.wa.us

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org  
**Filing on Behalf of:** Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 701  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20160804160821SC563867**